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Current Topics.

The General Strike.

IN A SPEECH to the House of Commons on Thursday of last week, Sir JOHN SIMON laid down four propositions as to the legality or illegality of strikes. Considerable publicity has been given in that which remained of our press to this pronouncement, which, coming as it did from such an eminent member of the legal profession, has been generally accepted as authoritative. The propositions laid down are as follows:—

(1) "A strike, properly understood, is perfectly lawful. The right to strike is the right that workmen in combination have by pre-arrangement of giving due notice to their employers to terminate their engagements and to withhold their labour when those notices have expired."

From this statement of the law no one can differ, whatever the party or colour may be to which he belongs or adheres.

(2) "Every workman who is bound by a contract to give notice before he leaves work and who, in view of that decision, has either chosen of his own free will or has been compelled to leave his employment without proper notice has broken the law . . . Every man in that position who has come out in disregard of the contract in his employment is personally liable to be sued in the county court for damages."

To that general statement of the law, again, no exception can be taken although, to be absolutely fair, it must be pointed out that in the case of the miners themselves notice had been given to terminate their engagements by the owners. In their case the position, though not strictly a "lock-out," resembles that position more closely than it does a strike. Further, in a number of instances, one hour or one day's notice on either side is sufficient to terminate the contract of employment, and this was in many cases duly given. But there are countless instances in which no notice at all was given; where contracts of employment were therefore broken, and where there is consequently liability in damages for breach of contract. It may be pointed out that neither the Trade Disputes nor any other Act will afford protection in these cases of liability.

We might perhaps suggest a minor amendment to this second general statement. The Employers and Workmen Act, 1875, s. 4, gives jurisdiction in disputes between an employer and a workman to a court of summary jurisdiction, where, however, the amount does not exceed £10.

(3) "Every trade union leader who has advised and prompted this course of action (i.e., breaches of contract) is liable in damages to the uttermost farthing of his personal possessions."

The learned King's Counsel gives no reasoning or authority for this sweeping declaration, and, with due respect, we suggest that none exists, but that, on the contrary, s. 3 of the Trade Disputes Act, 1906, is conclusive against liability. That section enacts that "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

To argue that what Parliament had in mind when passing the Trade Disputes Act was "legal strikes" or "strikes of a lawful character," is beside the point, as far as courts of law are concerned. To quote from Sir HENRY SLESSER'S work on the legality or otherwise of strikes for "political" purposes is also irrelevant; the origin of the crisis must, it is submitted, be viewed as an industrial or trade dispute in a particular industry. The definition of a "trade dispute" supplemented by that of "workmen" in the Act of 1906 (see s. 5 (3)) seems clearly to include the present case "any dispute . . . which is connected with the employment or non-employment . . . or with the conditions of labour, of *any person*" and "workmen" means "all persons employed in trade or industry *whether or not in the employment of the employer with whom a trade dispute arises.*" The words "in furtherance of" also appear to us to bring in the mining dispute. This reasoning is respectfully adhered to

notwithstanding the declaration contained in the second reason of ASTBURY, J., in granting an injunction in the case of *National Seamen's Union* v. *McVey*, *Times*, 11th inst.

Further, the whole object of the Trade Disputes Act was obviously the legalisation of illegality.

(4) "Many Trade Unions have a rule to the effect that if a member does not obey the orders of the executive of his union, he forfeits his benefit, and there is no court in this country which will ever construe such a rule as meaning that a man is to forfeit his benefit for declining to obey an unlawful order."

This "dogmatic statement," as Sir JOHN SIMON himself described it, would be indisputable, provided the matter could come before the court for construction. As it is, however, no court of justice has any jurisdiction to enforce directly or give damages for the breach of "any agreement for the application of the funds of a trade union to provide benefits to members": Trade Union Act, 1871, s. 4 (3). The only inroad so far made by the courts upon this principle is to grant an injunction prohibiting irregular and therefore illegal expulsion of members.

Whilst it is both instructive and necessary that the legal aspect of the present national calamity should be accurately gauged, it is as well to realize that these are, after all, but minor incidents of a much weightier and more urgent matter, which, by the good offices of men of goodwill such as the Archbishop of Canterbury, has been brought to a satisfactory conclusion.

As we go to press the terms (if any) on which the strike has been called off have not yet been published. It seems clear, however, that they can only have been agreed upon in outline and as a further basis of negotiation. The moderation and spirit of conciliation which by their triumph have made the first step in a general settlement possible, will be more than ever necessary to make the settlement complete.

Negligence in the Law of Torts.

IN AN EXTREMELY instructive article in the current number of the *Law Quarterly Review*, Dr. P. H. WINFIELD answers, by reference to history, the interesting question whether negligence is an independent tort or merely one of the modes in which it is possible to commit most torts. In the time of BRACTON, Dr. WINFIELD points out, there was very little trace of liability for negligence, at any rate in the Royal Courts, though no doubt grievances resulting from negligence were often dealt with on the basis of custom in the local courts. But by the nineteenth century, the action upon the case based on a variety of facts had extended the scope of the remedies open to a person who had suffered damage as the result of negligence "until all that was needed to bring the law to its present shape was a change in form and a statement of a general rule instead of an enumeration of particular instances." It is this process of extension which Dr. WINFIELD admirably describes in his learned article.

Labour Conditions and Compensation to "Odd Lot" Workmen.

AN IMPORTANT ruling on the position of "odd lot" men under the Workmen's Compensation Acts was recently delivered by the Court of Appeal in *Palmer* v. *Crawshay Bros.* (*Cyfarthfa*) *Limited*, *Times*, 29th ult. As to what is necessary to constitute an injured workman an "odd lot" man, one cannot do better than refer to the dicta of FLETCHER MOULTON, L.J., in *Cardiff Corporation* v. *Hull*, 1911, 1 K. B., at p. 1020, where the learned L.J. says: "If the accident has left the workman so injured that he is incapable of becoming an ordinary workman of average capacity in any well-known branch of the labour market—if in other words the capacities for work left to him fit him only for special cases and do not, so to speak, make his powers of labour a merchantable article in some of the well-known lines of the labour market, I think it is incumbent on the employer to show that such special employment can in fact be obtained by him." This principle appears to have been recognized by s. 16 of the 1923 Act, now replaced by s. 9 (4) of the Workmen's Compensation Act, 1925, which provides in effect that the judge is to treat the case as being one of total incapacity where a workman who has so far recovered from his injuries as to be fit for employment of a certain kind proves that he has taken all reasonable steps to obtain and has failed to obtain such employment, and that his failure to obtain such employment is a consequence wholly or mainly of the injury he has received. How far can labour conditions be taken into consideration for determining whether or not such "odd lot" men are capable of obtaining some sort of employment? This appears to have been the question at issue in *Palmer* v. *Crawshay Bros* (*supra.*). There the learned county court judge had found that, if labour conditions had been normal he would have, in the circumstances, awarded the workman compensation on the footing of total incapacity, having regard to the nature of his injuries, and his inability to find work, but the learned judge refused to treat the case as one of total incapacity, since, in his opinion, the fact that labour conditions were not normal, and that there was a great deal of unemployment in the district had to be taken into consideration. From this principle, however, the Court of Appeal dissented, that court being of opinion that in cases such as these, labour conditions could not be taken into consideration, and the Court of Appeal accordingly decided that in the circumstances the workman was entitled to compensation on the footing of total incapacity.

Payment of Fees in Lieu of Notice of Removal of Pupil from School.

A DIVISIONAL COURT (consisting of ROCHE and MACKINNON, JJ.) have given an interesting decision in the case of a parent who has removed his children from school without giving due notice of removal: *Ludecke* v. *Allen*, *Times*, 30th ult. Where, of course, there is a contract between the parties, it is necessary to refer to the contract to determine the rights and liabilities in such a case, and the terms of such a contract, it should be noted, may be in a prospectus. In such cases, where a pupil is removed without due notice being given, the parent or other person *in loco parentis* who is to be regarded as having entered into the contract with the school, will be liable to pay the amount stipulated in the contract as payable on the withdrawal of the pupil. Such sums are apparently to be regarded usually as being not in the nature of penalties, but in the nature of liquidated damages. This point was decided in *Levinssen* v. *Thornton*, 3 T.L.R. 657. It should be noted, however, that cases may occur when by reason of the amount payable in lieu of notice being out of all proportion to the damage suffered or otherwise, the payment may possibly be regarded as being in the nature of a penalty. In *Ludecke* v. *Allen*, *supra*, there was no contract (whether by prospectus or otherwise) in existence, but evidence was given to the effect that there was a custom in private schools that in the absence of agreement a pupil could not be removed without a term's notice of removal, and where no such notice was given, a term's fee had to be paid in lieu of notice. It should be observed that the only evidence given as to the existence of such a custom was given by the plaintiff, and there was no further evidence in support or against the existence of such a custom. The learned county court judge accepted the evidence and held that there was a custom to the effect above mentioned. On appeal the Divisional Court refused to disturb this finding of fact, but the court at the same time declined to lay down any general rule as to the existence or non-existence of such a custom.

Matrimonial Jurisdiction of Justices. Resumption of Cohabitation.

THE question whether cohabitation exists, has been put an end to, or resumed, arises, or may arise, in almost any husband-and-wife case under the statutes conferring matrimonial jurisdiction on justices, and it is imperative therefore to get clear ideas upon what cohabitation is.

The natural meaning of "cohabitation" is living or dwelling together. It is so used by some of the best English writers, even of relatives other than husband and wife. By an ambiguity which arises from the fact that sexual intercourse is the usual concomitant of the cohabitation of man and wife and from preference for a euphemism to describe such sexual intercourse, the word "cohabitation" is not uncommonly used as a synonym for sexual intercourse, though only for such intercourse between man and wife.

The use of two meanings of the term often leads to confusion of mind, and even lawyers will be found speaking of isolated acts of sexual intercourse as cohabitation. It is, however, at once common sense and good law that there can be cohabitation of man and wife without sexual intercourse, and acts of sexual intercourse between man and wife without cohabitation.

It is obvious that advanced age, defective health, or accidental injury, may make sexual copulation impossible, and yet the parties would go on living together, remaining in cohabitation within both the ordinary and the legal acceptation of the term. Upon this it is significant that, although inability to consummate a marriage makes it voidable by a decree of nullity, yet the courts, whose duty it is, in proper cases, to make orders for restitution of conjugal rights—that is to compel cohabitation—will not seek to enforce marital intercourse: *Orme* v. *Orme*, 1824, 2 Add. 382; 162 Eng. Rep. 335; *Rowe* v. *Rowe*, 1865, 34 L.J.P.M. & A. 111. The earlier of these two decisions makes it abundantly clear that sexual intercourse is not a *sine qua non* of cohabitation in the legal meaning of the term; and both judgments sufficiently distinguish between cohabitation and marital intercourse. The former does indeed include the latter, when it is present, but does not cease to exist in its absence.

Cohabitation comprises both an intention to lead a joint life and a series of acts done in carrying out that intention. The psychological element indeed furnishes the clue for determining whether cohabitation exists or not, for cohabitation of man and wife is not terminated by mere absence or other circumstances which curtail the full conjugal relationship. For it to cease there must, whatever the other circumstances may be, exist an intention of one or both to put an end to it.

In *Bradshaw* v. *Bradshaw*, 1897, P. 24, JEUNE, P., said: "Cohabitation does not necessarily imply that a husband and wife are living together physically under the same roof; if that were so, there would be large classes of persons to whom the term could have no application, married domestic servants, for example, who cannot live day and night under the same roof, but yet may cohabit together in the wider sense of the term."

There are other decisions to the same effect; see *Kay* v. *Kay*, 1904, P. 382, where GORELL BARNES, J., commenting upon the passage quoted from *Bradshaw* v. *Bradshaw*, said: "The only effect of that is to show that the word 'cohabitation' as used in *Fitzgerald* v. *Fitzgerald* does not necessarily mean that the parties are living together under the same roof, but that there may be states of cohabitation where they see as much of each other as they can, and yet are not separated because there has not been any real suspension of their ordinary conjugal relations." In *R.* v. *Creamer*, 1919, 1 K.B. 564, the Court of Criminal Appeal, quashing a conviction of a wife for stealing her husband's money while away on military service in France, said: "Husband and wife do not 'live together' only when occupying the same house. The law does not regard so much the physical separation as the existence or termination of the *consortium*."

Huxtable v. *Huxtable*, 1899, 68 L.J.P. 83, shows that, even where husband and wife have parted by mutual consent, having in view a reunion in the future, cohabitation may exist. In that case Sir F. H. JEUNE, P., said: "What is or is not cohabitation is not a simple question. Cohabitation may be of two sorts, one continuous, the other intermittent. The parties may reside together constantly, or there may be only occasional intercourse between them, which may, nevertheless, amount to cohabitation in the legal sense of the term. Such cohabitation may indeed exist together with an agreement to live apart."

In deciding whether cohabitation exists or not, evidence of acts of sexual intercourse, no doubt, form part of the evidence to be weighed, but they must not be taken as conclusive. Where the spouses are living apart under an agreement or an order such acts procured by fraud with a view to defeating the agreement or order cannot be accepted as any evidence of resumption of cohabitation, and even isolated acts which represent occasional complaisance or a yielding to momentary passion cannot have great weight.

On this aspect of the matter the facts and the judgment in *Robinson* v. *Robinson*, 890, 89 L.J., 119, an action tried at *nisi prius* to recover payments due under a deed of separation, are instructive. Subsequent to the deed the husband was apparently anxious that his wife should live with him again, and in consequence of his solicitation she did agree to come and stay with him. The husband took suitable rooms as his own were too small. On a Saturday the wife arrived with luggage and her child. She lunched with her husband, then went out without saying where, and returned in the evening. She stayed in her husband's room that night, and next day went to visit a sick friend. The husband called at the friend's on the Monday and suggested a visit to Herne Bay. She did not agree. A quarrel followed and she left him and did not return. It was submitted by counsel for the husband that this was a resumption of cohabitation sufficient to relieve the husband from continuing payments under the deed. DAY, J., held that a mere casual cohabitation was not necessarily a cessation of living separate, and that the staying together of husband and wife under the circumstances was not such as to relieve him from the covenant of the deed, since it did not appear from the evidence that the parties had a common intention of continuing to live together.

Rowell v. *Rowell*, 1900, 1 Q.B. 9, is a decision of the Court of Appeal. There husband and wife were living apart under a deed of separation. There was evidence that on four occasions she had sexual connexion with her husband at a lodging house she had kept. In addition to this they seem to have met in a more or less friendly way. After the acts of intercourse they continued to live apart and for some time the husband made payments under the deed. It was held that the deed was still in force. Lord RUSSELL, C. J., said, "Such acts are strong evidence unless explained; but it is not a necessary conclusion from that that it was intended to put an end to the deed of separation. The explanation in the present case is given by the wife that she yielded to her husband on statements, possibly extravagant, as to his health." A. L. SMITH, L.J., and VAUGHAN WILLIAMS, L.J., agreed.

Just on the other side of the line is the case of *Farmer* v. *Farmer*, 1894, 9 P. D. 245. Here a husband ceased to reside with his wife in 1880 on the pretence that his business compelled him to be absent, but he supplied her with necessaries and corresponded with her and visited her occasionally, and a child was born in February, 1884. In January, 1884, the wife discovered that he had for years been living with another woman. It was held that this did not amount to desertion; that is that cohabitation had not ceased.

What was said above that cohabitation comprises both an intention to lead a joint life and a course of conduct directed to carrying out that intention cannot be reiterated too often. In trying the issue whether cohabitation has been resumed or not the evidence must be examined to discover whether the joint life has been taken up on as full a basis as before; if not, whether the circumstances are such as not to make that possible; and also whether the actions of either party are a mere pretence covering *mala fides*. Cases quite often occur where a husband spends a night with his wife with the sole object of alleging resumption of cohabitation as a ground for discharge of an order. Apart from authority the point is covered by general principles, i.e., the essential nature of cohabitation and the rule that no man is to be allowed to profit by his own fraud, expressed in the maxim *nemo ex dolo suo proprio relevetur, aut auxilium capiat.*

The two cases quoted above, *Robinson* v. *Robinson*, 1890, and *Powell* v. *Powell*, 1900, turning on resumption of cohabitation as revoking a deed of separation are very much in point.

The case of *Michie* v. *Michie*, 1924, *The Times* 26th March, is important. This was a petition by a wife for divorce on the grounds of desertion and adultery. On the 29th January, 1923, the wife filed a petition for restitution of conjugal rights. On the 5th February, 1923, she received a letter from her husband by registered post in which he said he was willing to live with her, and asked her to join him at a seaside town. She went there on the 14th February and her husband took her to an hotel. On their arrival he told her he was acting on the advice of his solicitor, and what he was doing was to get rid of the restitution suit. He said he need only be with her for two days to prevent her from proceeding with that suit. He and she slept in the same room for two nights, in separate beds, and without having marital intercourse. On the 16th February he left her. Mr. Justice HILL said, "The resumption of cohabitation in February, 1923, was obviously a sham and I find desertion since January, 1919."

The following case may also be consulted with advantage: *Alice Rogers*, 1865, H. & R. 88. Here the question was whether husband and wife were "living apart" by mutual consent so that the court could maintain an order enabling the wife to dispose of her interest in property without the concurrence of her husband (long before the Married Women's Property Acts gave her this power). The husband, who asked for rescission of the order, had married without any arrangement securing to him a portion of his wife's income, and unhappy differences having arisen between them, it was agreed that they should live apart on her paying him £400 a year. He refused to sign an agreement on these terms, but they did actually live apart. But although they occupied different dwellings they occasionally visited, and the husband sometimes slept at his wife's house, and once or twice they took excursions together into the country.

ERLE, C.J., said, "To suggest that they were not living apart because occasionally they paid short visits to one another, there being at the same time an entire absence of mutual affection, is absurd. In my opinion, they were living under such circumstances as justified the wife in saying in her affidavit that they were living apart . . . Even from the husband's own affidavit it appears that his attempts to renew cohabitation were only made by way of threats to induce his wife to increase his income." Three other judges concurred and the court refused to rescind the order.

A Caution about Incumbrances.

UNDER the above heading, we dealt (*ante*, p. 517) with a case of great importance to members of the legal profession and all who deal with real property: *Stoney* v. *Eastbourne R.D.C. and Duke of Devonshire.* The numerous letters we have received from subscribers about the decision of Mr. Justice ROMER show that its effect has been appreciated in many quarters. The decision itself was reversed by the Court of Appeal on the 29th April last, but not on the point which affects conveyancers. We will briefly recapitulate the facts.

In 1921 the plaintiff purchased from the defendant, the Duke of Devonshire, a Jacobean farmhouse near Eastbourne called "Peelings." The price was £6,250. The conditions of sale pointed out that the transaction was subject to any rights of way there might be over the land sold. The answer to a requisition about the existence of such rights was: "Not to our knowledge." The conveyance recited that the property was held in fee simple "free from incumbrances." The Duke conveyed "as beneficial owner," thus letting in the implied covenants for title enacted in s. 7 of the Conveyancing Act of 1881 (now s. 76 and Sched. II of the Law of Property Act, 1925). There was no mention of "incumbrances" in the operative part of the deed. About three years after the purchase was completed, the plaintiff, who had in the meantime spent £6,000 on converting the place into a very beautiful residence, found that the villagers were walking up her carriage drive, round the house and outbuildings, and across her fields. She erected an obstruction to prevent this apparent trespass. The obstruction was promptly removed by the villagers. After correspondence with both defendants, from which it appeared that the Duke denied and the Council asserted the alleged public right of way, she commenced an action. At first the only defendant was the council. Against them she claimed a declaration that there was no public way. Afterwards the Duke was added, the claim against him being for damages for breach of the implied covenant for quiet enjoyment in the event of the claim against the council being unsuccessful.

The action was tried in two parts. The claim against the council was dealt with first and failed (this part of the case is now reported in 90 J.P. 57). Then came the claim against the Duke, which succeeded before Mr. Justice ROMER and failed before Lord HANWORTH, M.R., and WARRINGTON and SARGANT, L.JJ. Some nice questions of highway law were mooted, but these do not concern the conveyancing aspect of the case. The covenant in question was construed by both courts to mean that, where land is conveyed by a deed the operative part of which contains the words "as beneficial owner" and no qualification as to incumbrances, the vendor is liable in damages if there is an incumbrance, provided that the act which created the incumbrance took place "after the last purchase for value." It was on these last six words that the difference between Mr. Justice ROMER and the Court of Appeal arose.

Both courts agreed that the *onus* lay upon the plaintiff to prove affirmatively that the covenant had been broken by a person for whose acts the vendor was made responsible. They dismissed the argument (based on *The Glendarroch*, L.R. 1894, P. 226) that the words "otherwise than" operated as an "exception" which had to be proved by the person setting it up. It was part of the covenant, and not an exception: *David* v. *Sabin*, L.R. 1893, 1 Ch. 531. It being admitted that there had been no "purchase for value" since 1782, this ruling meant that the plaintiff had to establish that the act creating the incumbrance, in this case the dedication of the highway, took place after that year. As none of the parties to the action had any idea when dedication did take place, the discharge of that burden was manifestly a matter of very great difficulty. That being so, Mr. Justice

ROMER held that, as the "opportunities of knowledge" were with the vendor rather than the purchaser, it would not take much evidence to shift the burden. His lordship cited with approval the passage in "Halsbury" (vol. XIII, at p. 436) which laid this down on the authority of "Stephen's Digest of Evidence," and held that the absence of any trace of the footway on an estate map produced from the Duke's muniments and dated 1802, and on the tithe map of 1840, was sufficient evidence to shift the burden of proof to the Duke, and that he had not discharged the shifted burden. He therefore gave judgment for the plaintiff, the dire effects of which have already been noted by us (*ante*, p. 518). In the Court of Appeal, however, the application of the "knowledge" doctrine was negatived on the ground that, after discovery, both parties had equal knowledge. We should have thought that the time at which the knowledge should be tested was the date of the writ, when the Duke certainly had greater opportunities of knowledge, but apparently this is not correct.

That being so, the question resolved itself into this. Had the plaintiff given "sufficient *prima facie* evidence of dedication after 1782," or had she not? That left for consideration the effect of the two maps. It was held that, assuming that both maps were "admissible," which was doubted, they were not sufficient for the purpose. In the first place, their effect was merely negative. In the second place, though they did show seven other footpaths and two bridleways, they did not show the southern end of the existing footpath. That part of the path, as proved by the railway deposited plan of 1843, was public in that year. So that the maps were incomplete. The ordnance survey of 1890 showed a great many paths not marked on the maps in question, and, as the court discounted the observation that many of these paths were not public, and refused to presume what they called "an orgy of dedication" between 1840 and 1890, this was further evidence of the incompleteness of the earlier maps. In the third place, though tithe maps were good negative evidence in the case of carriageways (as was held in the *Stonehenge Case—Attorney-General* v. *Antrobus*, L.R. 1905, 2 Ch. at pp. 193-195), this did not apply to mere footways. The maps, therefore, were insufficient to discharge the onus. Other factors pointing to dedication after 1782 were disregarded as being too problematical. So that this unfortunate lady, unless she appeals to the House of Lords or settles such an appeal on terms, will have been sold something that the Duke had no right to sell, will be burdened by the public right, and will be mulcted in the very heavy costs which have been incurred by the three parties to the action.

Our "Caution about Incumbrances," however, still remains, because conveyancers who neglect it may not be as fortunate as the Duke. His escape was due to the fact that the date of the act creating the incumbrance could not be proved to the satisfaction of the court. The vendor might, as SARGANT, L.J., said during the argument, have "insisted on inserting words about rights of way," and in future vendors who fail so to protect themselves in the operative parts of their conveyances may not have the luck of His Grace of Devonshire in this case. We may also add a "caution to purchasers." If they suspect the existence of a highway across the land they are purchasing, they should insist upon the insertion in the conveyance of words making the date of dedication immaterial. That would save them from the unfortunate predicament in which Miss STONEY found herself through no fault of her own.

INCOME TAX DEFAULTERS.

At the Justice Room, Guildhall, recently, there was a batch of summonses for the non-payment of income tax. Mr. Baillie (collector) said that most of the men were employed by newspapers as printers, and were on strike. None of them was present and he did not want to aggravate matters by pressing the cases. He suggested the summonses should be adjourned. It was agreed to adjourn the cases till 2nd June.

A Conveyancer's Diary.

Trustees' Power to Invest on Real Securities.

The new legislation affects in more than one way trustees' power to invest on real securities. Section 1 (1) (*b*) of the T.A., 1925, empowers trustees (subject to any contrary intention expressed in the trust instrument: *ib.*, s. 69 (2)), to invest on real or heritable securities in the United Kingdom, including the security of a charge by way of legal mortgage and a charge under s. 33 of the Finance Act, 1896 (*i.e.*, charge on a capital sum paid for redeeming land tax). The provision authorizing investment on the security of a charge by way of legal mortgage, as to which see L.P.A., 1925, ss. 85, 87, is, of course, new; and it must not be overlooked that "United Kingdom" does not now include the Irish Free State: T.A., 1925, s. 68 (20).

Terms of years are not included in "real securities" under para. (*b*), *supra*: *Leigh* v. *L.*, 1886, 35 W.R. 121. By s. 5 (1) of the T.A., 1925, however, a trustee having power to invest in real securities may invest on mortgage of property held for an unexpired term of not less than 200 years, and not subject to a reservation of rent greater than 1s. a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent. This kind of long terms on the security of which trustees may invest should be compared with that which may be enlarged into a fee simple absolute under s. 153 of the L.P.A., 1925. It will be noted that they are not exactly alike.

Now, it was held in *Re Tattersall*, 1906, 2 Ch. 399, that s. 5 of the T.A., 1893, which is re-enacted in s. 5 of the new Act, only applied where trustees had express power to invest on real securities.

The point at issue in *Re Tattersall* was whether or not the general statutory power of a trustee to invest in the debenture stock of a certain class of railways under s. 1 (*g*) of the T.A., 1893, was enlarged by s. 5 (3), *ib.* "Section 5 (3)," said Swinfen Eady, J. (1906, 2 Ch., on p. 404), "assumes the existence of an instrument authorizing the investment in railway debentures or railway debenture stock. Again the powers conferred by ss. 1, 2, 3, are by s. 4 extended to trusts created before the passing of the Act, and are to be in addition to the powers conferred by the instrument (if any) creating the trust. There is no such provision as to the powers in s. 5. Moreover, if all trustees unless forbidden are to have the power of investing in nominal debentures, I see no reason for separating this power from the other powers comprised in s. 1."

It will be noted that most of this reasoning is not applicable to s-s. (1) of s. 5 of the Act of 1893, and in any case is not easy to follow.

The new Act has not changed the wording of the old provision, though the marginal note has been altered, the reference to "express" powers being omitted. With due respect we may state that we cannot see why s. 5 (1) as it stands should be construed to apply only to express powers. It is most general in its wording, "a trustee having *power* to invest in real securities." The natural construction of these words is to treat "power" as including an express power conferred by the trust instrument or the statutory power given by s. 1 (1) (*b*).

A charge or mortgage of any charge made under the Improvement of Land Act, 1864, also is authorized under s. 5 (1) (*a*) of the new T.A.

A trustee having power to invest in real securities may accept the security in the form of a charge by way of legal mortgage, and may convert an existing mortgage into such a charge: T.A., 1925, s. 5 (2). We have already seen that trustees can under s. 1 (1) (*b*) invest on a legal charge of real or heritable security, i.e., of freeholds. The object of s. 5 (2), therefore, seems to be to make it clear that trustees can invest on a charge by way of legal mortgage of the long terms

described in the preceding sub-section. It will be noted that the words "power to invest in real securities" are again used in this sub-section. Hence the question might arise here again whether or not the reasoning in *Re Tattersall, supra*, would apply so as to limit its application.

It may be noted that a power to invest in the purchase or on mortgage of land authorizes an investment in land subject to certain drainage charges: T.A., 1925, s. 6.

Again, it seems that s. 10 (2) of the T.A., 1925, extends indirectly the power of trustees to invest on real securities, for it empowers trustees and other fiduciary owners to leave two-thirds of the proceeds of sale of land held in fee simple or for a term of at least 500 years on mortgage or charge by way of legal mortgage of such land. The power given is only applicable where the proceeds of sale are liable to be invested and not immediately distributable when, of course, the consents of the persons entitled would be necessary.

It is interesting to note that whilst a power to invest in securities such as stocks and shares authorizes the purchase of such stocks and shares, a power to invest in real securities does not, unless a contrary intention appears, authorize the purchase of land but only the advancement of money upon a mortgage or charge on land. A power to invest in ground rents, however, may be construed as authorizing the purchase of such rents: *Re Mordan*, 1905, 1 Ch. 515.

This does not apply to s. 28 (1) of the L.P.A., 1925, and ss. 73 (1) (xi), 74 of the S.L.A., 1925, which authorize trustees for sale to invest capital money arising under a trust for sale in the purchase of land in fee simple or of leasehold land held for sixty years or more unexpired at the time of purchase. These provisions apply only to land situated in England or Wales. Land so purchased is to be conveyed upon trust for sale.

Landlord and Tenant Notebook.

At common law the effect, therefore, of an oral licence, coupled with a grant, was merely to create a licence, which, while affording the licensee a good answer to an action for trespass, so long as the licence was not countermanded, was nevertheless countermandable at the will of the licensor.

One must note, however, the manner in which equity dealt with such oral agreements. These equitable principles would appear to be best illustrated in *Frogley* v. *Earl of Lovelace*, 1859, Johnson, 333. There a lessor had executed a lease of certain lands to the lessee, and previously thereto had signed a written memorandum, but not under seal, giving the lessee the exclusive sporting rights over the lands included in the lease, and also the adjoining lands of the lessor. Subsequently the lessor purported to revoke the licence. It was held that the lessor might be restrained by injunction and ordered specifically to perform the agreement, and for that purpose to make and execute a proper lease. The principle of this case, however, is by no means to be confined to agreements which merely do not happen to be under seal, but are in writing; this principle will equally apply to purely oral agreements provided that there is part performance: cf. *MacManus* v. *Cooke*, 35 Ch. D. 681. These principles, it may be noted, are given statutory recognition in the above-mentioned provisions of the L.P.A.

To deal now with the question of the revocation of a licence. In the first place it should be noted that, provided there is an enforceable contract, a licensee, whether he be a bare licensee or the grantee of a licence coupled with a grant, will in any event be entitled to damages for breach of contract if the licence is wrongfully revoked: *Kerrison* v. *Smith*, 1897, 2 K.B. 445. There is however a material distinction between the position of a bare licensee and the grantee of a licence, coupled with a grant in considering the question whether the licensee is to be treated as a trespasser after the revocation of the licence, notwithstanding that such revocation is wrongful and in breach of contract. It would appear from the authorities that while a bare licence may be countermanded at any time, notwithstanding valuable consideration, and notwithstanding that the licence is under seal, a licence coupled with a grant is not so revocable. How, then, is *Wood* v. *Leadbitter*, *supra*, to be distinguished from *Hurst* v. *Picture Theatres Ltd.*, 1915, 1 K.B. 1? In the latter case the plaintiff, who had purchased a ticket for a seat at a cinema, had been forcibly removed by the management under the mistaken belief that the seat had not been paid for, and the plaintiff was held, contrary to the actual decision in *Wood* v. *Leadbitter*, entitled to recover damages for assault and false imprisonment. Both in *Wood* v. *Leadbitter* and in *Hurst's Case*, the licence was one that was coupled with a grant, but while the former was decided under the strict common law, the latter case was decided under the principles which equity would regard as applicable to grants not under seal of licences coupled with a grant.

In his judgment in *Hurst's Case* (*ib.*, at p. 6), Buckley, L.J. said: "*Wood* v. *Leadbitter* rested upon one of two grounds—, but I think it was the second of those which I am going to mention . . . They decided it upon the ground . . . that no incorporeal inheritance affecting land can be created or transferred otherwise than by deed . . . What Alderson, B., was saying there was: This man has got no deed; he had got nothing under seal; he has therefore not got a grant; he cannot in this court be heard to say he is a grantee, and because he is not a grantee he is a mere licensee, and being a mere licensee (whether it is under seal or not under seal does not make any difference) the licence is revocable . . ." And (at p. 7) the learned lord justice continues: "*Wood* v. *Leadbitter* was a case decided in a court of law before the Judicature Act; it was a case to be decided therefore simply upon the principles which are applicable in a court of law as distinguished from a court of equity."

The principle may be thus summed up, in the language of the learned lord justice in the same case (*ib.*, at pp. 9 and 10): "What was relied on in *Wood* v. *Leadbitter*, and rightly relied on at that date, was that there was not an instrument under seal, and therefore there was not a grant, and therefore the licensee could not say that he was a mere licensee, but a licensee with a grant. That is now swept away. It cannot be said against the plaintiff that he is a licensee with no grant merely because there is not an instrument under seal which gives him a right at law."

LAW OF PROPERTY ACTS.
Points in Practice.

Questions from Annual Subscribers are invited and will be answered by an eminent Conveyancer. All questions should be addressed to—The Assistant Editor, "The Solicitors' Journal," 94-97, Fetter Lane, E.C.4. The name and address of the Subscriber must accompany all communications, which should be typewritten (or written) on one side of the paper only and be in triplicate. To meet the convenience of Subscribers, in matters requiring urgent attention, answers will be forwarded by post.

UNDIVIDED SHARE—PROCEEDS OF SALE—RECEIPT OF PORTION—ONE TRUSTEE.

288. *Q.* Under a marriage settlement dated 1876 an undivided one-third of one moiety of certain real estate was conveyed to the trustees of the settlement upon trust, with the consent of the husband and wife or the survivor, for sale. The husband has died leaving a wife still surviving. Trustees for sale of the real property have been appointed under the L.P.A., 1925, by the owners of more than half the undivided shares and such trustees are proceeding to sell a part of the property. There is only one trustee of the marriage settlement living. Can the trustees for sale properly pay to the last

surviving trustee of the marriage settlement the share of the purchase money representing the undivided one-third of one moiety settled, or is it necessary that a second trustee be appointed ?

A. The trustees under the L.P.A., 1925, can give a valid receipt for the proceeds of sale of the land to the purchaser, which they will proceed to distribute in accordance with the L.P.A., 1925, s. 3 (1) (*b*) (i). The opinion is given here that s. 14 (2) of the T.A., 1925, and s. 27 (2) of the L.P.A., 1925, affect purchasers of land only, and do not earmark the proceeds of sale of land as money always requiring the receipt of two trustees if it passes from one set to another. Therefore on this view the surviving trustee can give a good receipt.

COPYHOLD—EXTINGUISHMENT OF MANORIAL INCIDENTS—RECEIPT BY LORD.

289. *Q.* A lord of a manor of which he is seised as absolute owner authorizes (by letter) his steward to enter into and sign compensation agreements on his behalf and to give receipts for compensation money. Objection is taken to the fact that under s. 138 (8) (*b*) the receipt for the compensation money, in order to be effective as a discharge, must be signed by the lord himself, and that consequently signature of the agreement by his agent is insufficient. It is also pointed out that under the Manorial Incidents (Extinguishment) Rules of 1925 a special form of power of attorney is provided which would be unnecessary if the agreements could be signed by the steward in the manner proposed. Please advise if a former copyholder will be safe in accepting an agreement signed by the steward, without insisting on signature by the lord himself ?

A. See generally answer to *Q.* 233, p. 524. The point is not free from difficulty, but, having regard to the general tenor of r. 29 (2) of the Manorial Incidents Extinguishment Rules, taken in conjunction with ss. 138 (8) and 139 (2) (*b*) the opinion is given here that the compensation money should be paid to the lord personally, unless the steward produces a specific power of attorney, executed by the lord, authorizing him to receive the money. Rule 29 (2), it is true, authorizes the steward to "make agreements," but it is guarded by the previous reference to matters of procedure, and must be taken as authorizing the steward to negotiate with full power in that behalf, but not to execute agreements. If it had been desired to authorize the steward to execute agreements and receive the compensation money, r. 29 (2) would not have been qualified as it is. An authority by letter, revocable at any instant, is not sufficient for safety. See discussion in the analogous case of vendor and purchaser, "Williams' Vendor and Purchaser," 3rd ed., p. 692.

CHARGE UNDER S. 77 (7) OF THE L.P.A., 1925—REGISTRATION UNDER L.C.A., 1923.

290. *Q.* A conveyance of part of freehold land which is subject to a chief rent is made subject to a part of the rent which is apportioned between vendor and purchaser without the consent of the rent owner. The covenants under s. 77 (1) of the L.P.A., 1925, are stated to be implied. If the conveyance goes on to say that the parties charge their respective parts of the land with payment of any money payable under the implied covenants of indemnity (see s-s. (7) of s. 77, and see precedent in Vol. I "Prideaux," p. 769), does this necessitate land charges being registered Class C as general equitable charges ?

In the above case s. 190 of the L.P.A., 1925, confers cross powers of entry and distress and perception of rents and profits whether the conveyance refers to that section or not. Must these powers also be registered as land charges ?

A. The questioner is referred to "A Conveyancer's Diary," p. 577, *ante*, where he will see his first point fully discussed, and the conclusion drawn that registration is necessary as suggested.

As to the further question, the remedies of s. 190 are conferred by statute without registration, and need none.

MORTGAGEE—PRE-1926 TITLE BY STATUTES OF LIMITATIONS.

291. *Q.* Section 88 of the L.P.A., 1925, by s-s. (3), empowers a mortgagee of freeholds, who has acquired a title under the Limitation Acts, to enlarge "the mortgage term" into a fee simple. How, if at all, can a mortgagee who already had the fee under a pre-1926 mortgage, and who has acquired a title under the Limitation Acts, vest the property in himself discharged from the equity of redemption ? Must he first make a declaration under s. 87 (2) ? If not, how otherwise can the end be attained ?

A. The operation of the L.P.A., 1925, 1st Sched., Pt. VII, on 1st January, 1926, took place only in the case of a subsisting right of redemption, see para. 8. If that right was then barred by statute, the mortgagee's freehold estate was not converted into a term thereby. For this reason s. 87 (2) does not apply. If, whether under the Statutes of Limitations or otherwise, a person originally a mortgagee was legal owner in fee simple on 31st December, 1925, unaffected by an equity of redemption, he continues to hold his estate accordingly.

MORTGAGE—LEASEHOLDS—NOMINAL REVERSION—PRE-1926 SALE BY MORTGAGEE.

292. *Q.* On the 31st December, 1925, an owner of leaseholds was an assignee of a mortgage term, the original mortgagee having sold under his power of sale to a predecessor of the present owner. The mortgage contained a declaration of trust as to the nominal reversion, but the assignment by the original mortgagee and the subsequent assignments do not purport to assign the benefit of such declaration of trust. Section 89 (1) of the L.P.A., 1925, would only appear to apply on the occasion of a sale by a mortgagee after 1925, and not to apply to an assignment at any time by a purchaser from a mortgagee.

(*a*) Is the present owner now or will a purchaser from him become entitled to the full lease term under para. 2 of Pt. II of the 1st Sched. to the L.P.A., 1925 ? Would the answer be the same (1) if the benefit of the declaration had been assigned by the original mortgagee, or (2) if the mortgage had not contained any declaration of trust as to the nominal reversion ?

(*b*) Would a purchaser from a mortgagee by demise who sells after 1925, and who would thus come under s. 89 (1) of the L.P.A., 1925, become as an assign of the lease term liable to the lessor for the rent and covenants of the lease ?

(*c*) Would a sale to such a purchaser be a purchase on sale so as to give rise to compulsory registration under the L.R.A., 1925, seeing that the nominal reversion would be vested in the purchaser by virtue of the L.P.A., 1925, and not by express assignment ?

A. (*a*) For the reasons given in the answer to *Q.* 188, p. 440, *ante*, para. 3 rather than para. 2 of Pt. II, 1st Sched. to the L.P.A., 1925, seems applicable to the case, with, however, the result suggested, that the purchaser takes the full lease. *A fortiori*, he would do so if the benefit of the declaration of trust had been assigned to him, but if there had been no declaration of trust he could only take that to which his vendor was entitled, namely, the sub-term. See also answer to *Q.* 194, p. 460, *ante*.

(*b*) Yes.

(*c*) Yes, if the term has over forty years to run, see s. 123 (1). The fact that an Act of Parliament vested the nominal reversion in the purchaser would no more affect registration than did the vesting of legal remainders in a purchaser under the S.L.A., 1882 to 1890, from a tenant for life only, in whom those legal remainders were not vested.

RESTRICTIVE COVENANTS—REGISTRATION.

293. *Q.* If I buy land (not in a registered county) and the conveyance contains restrictive covenants and a grant of easements over property of my vendor, should my vendor not register the restrictive covenants against my name and the easements against his own name as a land charge, and, in case

of his failure to do so, should not I register the easements against the name of my vendor as a land charge? If I take such an assurance in a registered county, is it necessary to do anything more than register the transfer or memorial in the registry? In the case of a purchase in a registered county, is it necessary to search both in the register of charges and in the local deeds registry?

A. The party who registers restrictive covenants is the one for whose benefit they are made—the vendor registering the conveyance in respect of the purchaser's covenants and *vice versa*. An easement in fee subsists at law by virtue of s. 1 (2) (*a*) of the L.P.A., 1925, and does not require registration, but if it is merely an equitable easement (for example, one for life only), then it may be registered under the L.C.A., 1925, s. 10 (1), Class D (iii). If a deed containing a restrictive covenant is registered in the Yorkshire Registry, registration under the L.C.A., 1925, is unnecessary; see s. 10 (6). But otherwise as to Middlesex, see s. 18 (*b*). Thus a Middlesex purchaser must search both registries, and the learned authors of "Wolstenholme's and Cherry's Conveyancing Statutes," 11th ed., give the opinion on reasoning, respectfully adopted here, that a Yorkshire purchaser should do so too; see note to L.C.A., s. 10 (6), p. 587.

UNDIVIDED SHARE—MORTGAGE OF—RECEIPT—RE-CONVEYANCE.

294. *Q.* In 1926 A and B purchased land providing the purchase money in equal shares. The land is conveyed to them upon trust for sale and to hold the net proceeds in trust for themselves in equal shares. They erect a house on the land and B then mortgages her share in the net sale proceeds, the form used being that suggested in the "Encyclopedia of Forms and Precedents." B now desires to pay off the mortgage. Should the receipt set out in the L.P.A., 1925, be used and the receipt stamped sixpence per cent., or will it be sufficient for an ordinary receipt to be endorsed on the mortgage and signed by the mortgagee over a twopenny stamp?

A. B alone was never in a position to mortgage or charge the land, but only her share of the proceeds of sale or rents until sale. The mortgagee has, therefore, no estate to re-convey, and the case appears to fall within the principle of *Firth* v. *Commissioners of I.R.*, 1904, 2 K.B. 205. On this footing the ordinary twopenny receipt stamp will suffice.

SETTLED LAND—NEED FOR VESTING DEED.

295. *Q.* Owing to a death which occurred last year, A became entitled, as tenant for life, to large estates. He now proposes to grant building leases for 999 years. Is he able to do this before a vesting deed has been executed? The preparation of the vesting deed in this case will take a long time, and it is essential that the building leases should come into operation at once. If a vesting deed is necessary, is there any other way he can validly grant the lease before the vesting deed is completed?

A. A cannot make legal dispositions of any land not included in a vesting deed, see s. 13 of the S.L.A., 1925, and it is hardly likely that an intending lessee would be satisfied with less (unless he had actually contracted to accept a lease and was bound by s. 44 (2) of the L.P.A., 1925). The suggestion, however, is made here that if the preparation of a single vesting deed to include all the property passing under the will is likely to cause delay, owing to the number of parcels, a vesting deed or deeds of the land ready for immediate dealing should be executed in reliance on *Re Clayton*, W.N. 1926, p. 54.

RESTRICTIVE COVENANTS—REGISTRATION—PROVISO EXCLUDING DEROGATION.

296. *Q.* Freehold land is conveyed by A to B, in 1926. The land so conveyed is part of a larger piece of land belonging to A. The conveyance to B contains a proviso that the purchaser and his successors in title should not be entitled to any right of access of light or air to buildings to be erected on the land thereby conveyed, which would restrict or interfere with the free user of any adjoining land of the vendor for building or any other purpose. Does this proviso constitute a restriction which requires registration under the L.C.A., 1925?

A. The proviso merely excludes the doctrine of derogation, and, whether that doctrine would import into a conveyance a registrable restrictive covenant or not (a point at least of some doubt), the fact that it is excluded seems that, so far from restriction on user being imposed, it is expressly negatived. There is, therefore, no restrictive covenant to register.

SETTLED LAND—SOLE TRUSTEE—VESTING DEED.

297. *Q.* On the 1st January, 1926, A was tenant for life of freehold property by virtue of a will which came into effect before 1926. The said will appointed two trustees to be trustees for the purposes of the S.L.A., 1882-1890, but declared that a sole trustee for the time being thereof should be competent to act for all the purposes of the said Acts. On the 1st January, 1926, there was a sole trustee, the other having died some years before. Should the sole trustee now execute a vesting deed before appointing another trustee to act with him, or should he appoint another trustee first and then the two trustees execute a vesting deed?

A. Under s. 94 (2) of the S.L.A., 1925, a sole trustee can execute a vesting deed, but for the reasons given in the answer to q. 269, p. 600, *ante*, the other course suggested is recommended as preferable.

APPOINTMENT OF NEW TRUSTEE—APPOINTORS APPOINTING THEMSELVES—POSSIBILITIES OF FRAUD.

298. *Q.* A and B, husband and wife, have power to appoint new trustees under the provisions of their marriage settlement. On the death of X, the surviving trustee, they decide to appoint themselves, which they are empowered to do by s. 36 (1) of the T.A., 1925. On the appointment being made, A and B obtain complete control of the trust funds, and are in a position to dissipate them to the disadvantage of those coming after them, who need not, of course, necessarily be their children. This appears to be the result of the new conveyancing. On what possible grounds can such a situation be justified?

A. This question is perhaps referable with more propriety to the Legislature which has passed the new Trustee Act than to one professing to expound its provisions. Still, any dishonest trustees, whether appointors or otherwise, could dissipate trust securities. Possibly a dishonest husband might influence his wife more easily than any other co-trustee (or *vice versa*), but the present fashion in legislation is to regard husband and wife as entirely independent entities. The reversioners are entitled within reason to inspect share certificates, etc., when they please: see *Re Cowin*, 1886, 33 C.D. 179; and a court will interfere if a case of jeopardy is shown. A reversioner would also strengthen a case of alleged jeopardy if he asked the life tenants who had appointed themselves as trustees to appoint a custodian trustee at his expense, and had been refused. When all has been said, however, the questioner makes a good point, and trust funds should not be allowed to pass into the sole control of persons with life interests only.

SETTLED LAND—SOLE TRUSTEE—VESTING DEED.

299. *Q.* X is the only trustee under a will which came into effect prior to the new Acts. The will contained no power of appointment of new trustees. A vesting deed is now required to enable the tenant for life to sell. X is appointing Z to be an additional trustee. (1) Should Z be appointed before the vesting deed so that he may be a party to it? (2) If so, is there any necessity for a deed of declaration under S.L.A., s. 35 (1), seeing that the vesting deed will state that X and Z are the trustees?

A. It is assumed that X is either a trustee for the purposes of the S.L.A., 1925, within one of the classifications of s. 30 (1),

or is executor and so takes office under s. 30 (3). The question asked is answered above and in *Q.* 269, p. 600.

WILL—TERM FOR MAINTENANCE OF INFANT CHILDREN—SALE OF REALTY.

300. *Q.* A, who died in 1906, by his will appointed B and C executors and trustees thereof, and gave all his property of which he died possessed to his trustees upon trust to allow his wife £2 per week (or such sum up to £2 per week as the estate would provide) for the maintenance and education of his children, until such time as the youngest of his children should attain the age of twenty-one years, when he desired them (that is, the trustees) to sell the property and deal with the proceeds as mentioned in his will, and he further gave his trustees power to sell any of the property at any time if they should think it desirable so to do and invest the proceeds and apply the income as mentioned in the will, and he directed that if there should be any surplus income over £2 per week his trustees were to accumulate it and add it to the capital sum for ultimate division or use it for the maintenance and education of his children, as they might think fit. The will was proved by B and C, and C is now the surviving trustee, B having died some years ago. The whole of the income (which has not been sufficient to pay £2 per week) has been paid to the widow. The youngest child of the deceased will attain the age of twenty-one years in September next. The surviving trustee desires to take the necessary steps to sell the property and to wind up the estate, and the following questions arise :—

(1) Presumably another trustee must be appointed ? Has C the power of appointed the new trustee, or is the widow under the terms of the will a " tenant for life," and, as such, entitled to make the appointment ? (No express power of appointment is given by the will).

(2) Is a vesting deed necessary, and if so, should this be executed prior or subsequent to the appointment of a new trustee ?

(3) Will the trustees (when the new one has been appointed) have power to sell the property (which is both freehold and leasehold) prior to the youngest child attaining the age of twenty-one, or must they wait until this event happens before selling ?

A. The will should have been abstracted sufficiently to show the ultimate trusts, presumably for the benefit of thechildren, but it is not so stated, nor does it appear whether any particular child takes a vested or contingent interest. The annuity of £2 to the widow is to be applied by her wholly for the benefit of the children, and though as a practical matter she has the benefit of money to pay rent, &c., legally she has no personal beneficial interest, and if in fact the children were all being maintained and educated by other people the trust would fail. Had there been a surplus of income over the £2 the trustees might have used it in maintaining and educating the children or have accumulated it. The trustees having a discretion, no one child could claim an equal share in any income so applied for maintenance, and therefore the children, although as a class all the income must be either used or accumulated for their benefit do not necessarily take it in equal shares. On this reasoning a joint tenancy is excluded, and the trustee held the property on 31st December, 1925, for the children in undivided shares vested in possession, and, thus applying the L.P.A., 1925, 1st Sched., Pt. IV, para. 1 (1), he holds on trust for sale, but as sole trustee he cannot give a receipt for the proceeds of sale, and therefore must appoint another before completion. But alternatively he can make title as executor of A under the A.E.A., 1925, s. 36 (8) and (12), and so give a receipt for purchase money himself. Since the estate has presumably long since been wound up, however, if he takes this course he should obtain the written concurrence of the beneficiaries *sui juris* and satisfy himself, by the indemnities of the others or otherwise, that the youngest child, aged twenty, will ratify the transaction on attaining majority. Since the widow has no personal beneficial interest, the opinion is given here that she is not a tenant for life under the S.L.A., 1925, and therefore in the circumstances C has the power of appointment of a new trustee. No vesting deed will be necessary.

Correspondence.

Mortgage by Sub-demise—Sale by Mortgagee.

Sir,—As subscribers to the SOLICITORS' JOURNAL, we understand that an immediate reply would be given to difficulties arising under the new Law of Property Acts. We think we have a simple case, which we should like to have verified, and which we are therefore placing before you.

A leasehold property for 999 years was mortgaged by sub-demise. The mortgagee subsequently sold the property under power of sale, but did not assign to the purchaser the outstanding seven days of the sub-lease. The question now arising is, is the term a satisfied term under Section 116 of the Law of Property Act, 1925, and can the present assignee assign to the purchaser the original term of 999 years and ignore the sub-lease ?

Huddersfield. MILLS & BEST.
4th May.

A Conveyancer's Diary.

Sir,—We were most interested to read the first paragraph in " A Conveyancer's Diary " in the present issue of your Journal (1st May) dealing with Abstracts of Title and Memoranda on Deposit of Title Deeds. It appears, however, to us, that the views expressed in this paragraph are completely at variance with the answer to question No. 266, appearing on page 581 of your issue of the 24th April last. In view of the importance of the point involved we shall be obliged by your letting us know whether you now consider that the answer to Question 266 is not correct, and that we can therefore rely on the views expressed in " A Conveyancer's Diary " of 1st May, and not bring on the title Equitable Mortgages accompanied by deposit of title deeds in favour of banks.

Birmingham, HARDING & SON.
3rd May.

[There seems to be a considerable difference of opinion in Lincoln's Inn on the question raised by our correspondents. The reasoning adopted in our " Points in Practice," on p. 581, is perfectly sound, and to ensure absolute safety for the purchaser in such a case as that given a memorandum of deposit might well be abstracted. On the other hand, the fact is that as the result of s. 13 of the L.P.A., 1925, the pre-1926 position of such memoranda is not changed. Hence, where a purchaser is assured by the bank that there is no charge on the property to be sold, such purchaser may safely rely on the bank's statement and need not, therefore, in practice require the memorandum of deposit to be abstracted. The practice of not abstracting after receipt of a letter from the bank is naturally more convenient and less expensive, and has, to our knowledge, been recommended to bankers as the proper mode of proceeding. If no letter (or some other similar release) such as that referred to in " A Conveyancer's Diary," is given by the bank, it seems that the only course is to abstract the memorandum of deposit.—ED. *Sol. J.*]

The Taxation of Fugitive Millionaires.

Sir,—I should be glad if you would allow me to make a short reply to " F's " criticisms of my article, which I wrote with full appreciation of the practical difficulties involved. One is that the revenue authorities cannot put the names of

perhaps a couple of dozen elderly profiteers into a schedule, and ask Parliament for a "*ne exeat regno*" for them until they had given security for the taxes and duties so justly due from them on the fortunes made from the country's necessity. Yet such an Act might save millions, and would achieve almost all that could be gained by a statute which would be a nuisance to everybody. It does not follow, however, that everybody's movements must be hampered because a few selfish men cannot be named. The revenue authorities might be given power to act upon proof to the Special Commissioners or other authority that a particular super-taxpayer of mature years held his fortune in a very liquid form. As to rich young people, whose desirable emigration "F" suggests would be hindered, I should have thought they were rather wanted here, but an age limit of fifty before the Act could operate should meet his objection. The man who emigrates to escape death duties is seldom less than that. Those actually earning incomes, however great, are comparatively safe. Those whose wealth is derived from foreign or colonial sources alone are probably people who or whose fathers have settled here, presumably because they consider our country a desirable place of residence. Such persons have comparatively little moral duty to pay our taxes and should be left free. So far as the flight from taxation may result in heavy loss to the country, it is confined to very few persons, and it should not pass the wit of man to prevent it.

YOUR CONTRIBUTOR.

Court of Appeal.

No. 1,

***In re* Thain: Thain *v.* Taylor.** April 23.

INFANT—CUSTODY—PRIMARY RIGHT OF PARENT—WELFARE OF INFANT—CONSIDERATIONS GUIDING THE COURT.

The welfare of a child is the paramount consideration guiding the court in making an order as to its custody. But it is not the only consideration, and the next consideration is the right of a parent, particularly of a parent whose conduct has not been impeached; and therefore effect will be given to a parent's right and desire for the custody of his child where the welfare of that child does not require a contrary decision.

Appeal from a decision of Eve, J., reported 70 SOL. J., p. 504.

Mr. W. A. Thain married in 1911. His wife died in 1919, leaving an only child, a daughter, Margaret Louise Thain, then about eight months old. Mr. Thain at the time had no settled home, and, having no female relatives of his own to help him in looking after the child, he entrusted her to the care of his late wife's married sister, a Mrs. Jones, and her husband, who took her, as they alleged, on the understanding that she was to remain with them until she was of an age when she could herself elect whether she would or would not leave them. In 1922 Mr. Thain married again, but agreed with Mr. and Mrs. Jones that the child should still remain with them. Subsequently his position in life improved, he had no children by his second marriage, and his wife and he desired to regain the custody of the child. Evidence showed that he had constantly visited the child at week-ends or during periods of leave; that he had regularly paid Mrs. Jones 12s. 6d. a week for the child's maintenance; and that he had discharged other items of expenditure on her behalf, these payments in the four years ending 1924 amounting to some £366. Mr. and Mrs. Jones contended that Mr. Thain had agreed to surrender his parental rights to the custody and upbringing of the child. After proceedings upon a writ of *habeas corpus* in the King's Bench Division, Mr. and Mrs. Jones took out a summons for an order giving them the custody of the child. Eve, J., citing with approval the judgment of FitzGibbon, L.J., in *In re O'Hara*, 1900, 2 I.R. 232, at p. 240, said that though the infant's welfare was the first and paramount consideration, there were other considerations, the first being the rights and wishes of a parent, and as he was satisfied as to the child's welfare in either home, he made an order for her to be delivered to her father's custody. Mr. and Mrs. Jones appealed. The Court dismissed the appeal.

Lord HANWORTH, M.R., said that the principle that the child's welfare was the first and paramount consideration must be construed widely; not merely looking at the point whether the child would be happier in one home or the other, but at the question of her general welfare. The rights of a father ought not to be disregarded. At some time or other the child ought to be brought into touch with her father, and it seemed better that she should go at once to her proper home.

WARRINGTON and SARGENT, L.JJ., delivered judgments to the same effect.

COUNSEL: *Maugham*, K.C., and *D. D. Robertson*; *Gover*, K.C., and *L. W. Byrne*.

SOLICITORS: *Sharpe, Pritchard & Co.*, for *D. Rogers, Evans & Jones*, Newport; *Tiddeman & Marshall*.

[Reported by G. T. WHITFIELD-HAYES, Esq., Barrister-at-Law.]

High Court—Chancery Division.

***In re* Abergavenny Settled Estates: Marquess of Abergavenny *v.* Nevill.**

Russell, J. 25th and 26th February.

REVENUE—ESTATE DUTY—ESTATE SETTLED BY ACT OF PARLIAMENT—ESTATE RENDERED INALIENABLE THEREBY—MONEYS DEPOSITED WITH INLAND REVENUE BEFORE ASSESSMENT—OPTION TO RAISE AND PAY DUTY OUT OF CORPUS—FINANCE ACT, 1922, 12 & 13 Geo. 5, c. 17, s. 44.

Where the Inland Revenue have only been put in possession of a fund in order that they may be able to pay themselves when duty is assessed, such transaction is not a payment of duty, and accordingly where there had been great delay in the assessment of the duty and it had not been assessed until after the date of the passing of the Finance Act, 1922, *although the tenant for life had from time to time paid sums to the Inland Revenue to meet the assessment when made, he was held entitled to raise and pay out of the corpus under s. 44 of the Finance Act*, 1922.

Held, however, that the rent-charges were not inalienable and accordingly that the persons entitled thereto were not entitled to have the duty thereon raised out of the corpus under s. 44.

Originating summons. This was a summons asking for a declaration that the whole of the estate duty payable on the death of the late Marquess of Abergavenny in respect of the interest of the plaintiff on the Abergavenny settled estates was in fact unpaid on 20th July, 1922, the date of the passing of the Finance Act, 1922, and that s. 44 of that Act gave to the plaintiff the option to raise and pay the duty out of the corpus of the settled estates. The summons further asked whether such part of the estate duty which became payable on the death of the late Marquess in respect of the life rent-charges as remained unpaid on 20th July, 1922, was at the option of the person entitled to the rent-charge to be raised and paid out of the corpus of the settled estates or only out of the rent-charges themselves. The facts were as follows: The plaintiff, a person of unsound mind, not so found by inquisition, who appeared by his brother, the committee of his estate was tenant in tail male in possession under a settlement made by a private Act of Parliament (2 & 3 Ph. & M. No. 22) of an inalienable estate. The late Marquess who died on 12th December, 1915, under the powers given him by the Earl of Abergavenny's Private Estates Act, 1864, created rent-charges in favour of certain of his children. For the purpose of avoiding payment of interest, and under the

impression that the estate duty on the inalienable estates was to be aggregated with other property passing on the death of the late Marquess, sums out of income, amounting to £57,608 2s. 6d., and sums of £20,000 out of capital moneys received from sales, were from time to time paid over to the Inland Revenue. Following the decision in *Neville* v. *The Inland Revenue Commissioners*, 1924, A. C. 385, a sum of £15,756 was returned to the trustees. Until 1925 no assessment of duty was made.

RUSSELL, J., after stating the facts, said: I am unable to distinguish the facts in the present case from those in *In re the Bolton Estates*, the unreported case in 1924 which has been referred to, where I held that there had been no payment of duty within the meaning of s. 44 of the Finance Act, 1922, but that the Inland Revenue had only been put in possession of a fund in order that they might be able to pay themselves when the duty was assessed. In the present case there was great delay in assessing the duty, and the tenant for life from time to time paid sums to the Inland Revenue so that when the estate duty was assessed there might be a fund out of which the Inland Revenue could pay themselves. The duty was not assessed till 1925. In these circumstances the duty had not been paid by 20th July, 1922, and therefore the tenant for life, acting through his committee, had the option under s. 44 of the Finance Act, 1922, of raising and paying it out of the corpus of the settled estate. As to the second question, before the persons entitled to the rent-charges could exercise the option to have the duty paid out of the corpus, they must establish that they came within s. 44. But the duty referred to in that section was a duty payable under s. 5, s-s. (5), of the Finance Act, 1894, in respect of land or chattels so settled by Act of Parliament or Royal Grant, that the person entitled in possession could not alienate them, whereas the power to create rent-charges was given, not by such an Act, but by the Earl of Abergavenny's Estates Act, 1864, which gave a limited right of alienation. Rent-charges are not lands settled by Act of Parliament or Royal Grant, so that no one of the persons successively in possession thereof is capable of alienating them; they are capable of alienation. The persons entitled to the rent-charges are not entitled to have the duty remaining unpaid on 20th July, 1922, raised and paid out of the corpus of the settled estates. The estate duty is payable out of the rent-charges themselves.

COUNSEL: *F. E. Farrer, Preston*, K.C., and *Rawlence; Bennett*, K.C., and *Byrne; Baden Fuller* and *E. J. Harman*.

SOLICITORS: *Williams & James; Hasties; Farrer & Co.; Lee & Pembertons; Evans, Barraclough & Co.*

[Reported by L. MORGAN MAY, Esq., Barrister-at-Law.]

Rules and Orders.

RAILWAY AND CANAL COMMISSION.

THE RAILWAY AND CANAL COMMISSION (PAYMENT INTO COURT) RULES, 1926.

We, the Railway and Canal Commissioners, with the approval of the Lord Chancellor and the Secretary of State for the Home Department, do, by virtue of the Railway and Canal Traffic Act, 1888, and all other powers enabling us in this behalf, hereby make the following Rules:—

1. Rule 31 of the Railway and Canal Commission Rules, 1924, shall be annulled and the following Rule shall be substituted therefor:—

"*Payment into and out of Court.*

"31. Where under Part I of the Mines (Working Facilities and Support) Act, 1923, the Commissioners have determined that a right should be granted subject to the payment of compensation or consideration, and have ordered the payment into Court of money, being the whole or any part or any sum on account of the compensation or consideration, the money shall be paid, in English and Irish cases, into the Supreme Court, and in Scotch cases into the Court of Session.

An Order for the payment of any such money into or out of Court, shall be signed by the Registrar and counter-signed by one of the Commissioners.

In English and Irish cases the manner of payment into and out of Court and the manner in which money in Court shall be dealt with shall, subject as aforesaid, be regulated by the Supreme Court Funds Rules in force for the time being, so far as they are applicable."

2. We hereby certify that on account of urgency these Rules should come into operation on the 27th day of April 1926, as Provisional Rules.

3. These Rules may be cited as the Railway and Canal Commission (Payment into Court) Rules, 1926, and shall come into operation on the 27th day of April, 1926, and the Railway and Canal Commission Rules, 1924, shall have effect as amended by these Rules.

Dated the 26th day of April 1926.

Approved, (Signed) *John Sankey.*
Cave, C. *Robert L. Blackburn*
W. Joynson-Hicks, *E. Tindal Atkinson.*
Home Secretary. *J. C. Lewis Coward.*

MASTER AND SERVANT.

WORKMEN'S COMPENSATION ACTS, 1906 TO 1923.

THE WORKMEN'S COMPENSATION (AMENDMENT) RULES, 1926. DATED APRIL 27, 1926.

1. In these Rules:—

"the existing Rules" means the Consolidated Workmen's Compensation Rules, July, 1913, * as amended.

2. In sub-paragraph (*a*) of paragraph (6) of Rule 19 of the existing Rules after the word "judge," there shall be inserted the words "in his discretion."

3. In sub-paragraph (*b*) of paragraph (6) of Rule 19 of the existing Rules the following words shall be annulled "further proceedings against such respondent shall be stayed, except as hereinafter mentioned," and the following words shall be substituted therefor:—

"the judge may in his discretion, on application in that behalf, made to him in or out of Court, award that further proceedings against such respondent be stayed, except as hereinafter mentioned and subject to payment of the prescribed fee on the award";

and in sub-paragraph (i) after the words "the judge may," there shall be inserted the words "in his discretion."

4. At the end of Rule 51 of the existing Rules, there shall be added the following paragraph:—

"(12) If any party interested desires to receive notice by post of the fact and date when a memorandum of agreement is recorded, he may send to the Registrar a prepaid postcard addressed to himself and containing on the back the name of the Court, the name and number of the matter, and the words 'The above matter sent for registration was duly recorded on the ' a blank being left for the date and the Registrar's signature; and if he does so, the Registrar shall fill in the date of registration and sign and post the postcard as soon as may be after the memorandum has been recorded."

5. These Rules may be cited as the Workmen's Compensation (Amendment) Rules, 1926, and the existing Rules shall have effect as further amended by these Rules.

We hereby submit these Rules to the Lord Chancellor.

Edward Bray. *J. J. Parfitt.*
T. C. Granger. *Arthur L. Lowe.*
J. W. McCarthy. *A. H. Coley.*

I allow these Rules, which shall come into force on the 30th day of April, 1926.

Dated the 27th day of April, 1926. *Cave*, C.

* S.R. & O., 1913, No. 661.

RULES OF THE SUPREME COURT (No. 1), 1926.

We, the Rule Committee of the Supreme Court, hereby make the following Rules:—

1. Notwithstanding anything in Order XIX, Rule 9, every pleading may be either written or printed or typewritten.

2. The time for entering an appearance to a writ of summons shall be regulated as follows:—

(*a*) In the case of a writ issued out of the Central Office—

(i) When the defendant resides or carries on business within three miles of the Central Hall at the Royal Courts of Justice, the time for entering appearance shall be within eight days after the service of the writ, inclusive of the day of the service.

(ii) When the defendant does not reside or carry on business within three miles from the Central Hall at the Royal Courts of Justice, the time for entering appearance shall be within fifteen days after the service of the writ, inclusive of the day of the service.

(*b*) In the case of a writ issued out of a District Registry :—

(i) When the defendant resides or carries on business within three miles of the District Registry, the time for entering appearance shall be within eight days after the service of the writ inclusive of the day of the service.

(ii) When the defendant does not reside or carry on business within three miles from the District Registry, the time for entering an appearance shall be within fifteen days after the service of the writ, inclusive of the day of the service.

3. In the case where there is more than one defendant, the above Rule shall be deemed to apply to each defendant individually according as he does or does not reside or carry on business within the distances specified.

4. In these Rules the expression "writ of summons" shall include an originating summons to which an appearance is required to be entered.

5. These Rules shall apply and regulate the time for entering appearance notwithstanding any statement or indorsement on the writ of summons.

6. These Rules shall not apply to a writ of summons issued for service out of the jurisdiction.

7. These Rules may be cited as the Rules of the Supreme Court (No. 1) 1926, and shall come into operation on the 7th day of May 1926.

Dated this 6th day of May, 1926.

Cave, C.	*A. A. Roche*, J.
Hewart, C.J.	*P. Ogden Lawrence*, J.
Hanworth, M.R.	*T. R. Hughes*,
Merrivale, P.	*E. W. Hansell*,
Charles H. Sargant, L.J.	*C. H. Morton*.
John Sankey, J.	*Roger Gregory*.

EMERGENCY.

COAL.

THE LOCAL AUTHORITIES (COAL EMERGENCY) ORDER, 1926, DATED MAY 1, 1926, MADE BY THE MINISTER OF HEALTH UNDER THE EMERGENCY REGULATIONS, 1926, WHICH WERE ISSUED UNDER THE EMERGENCY POWERS ACT, 1920 (10 & 11 GEO. 5, c. 55).

70,182.

The Minister of Health, in exercise of the powers conferred on him by the Emergency Regulations, 1926(*a*), and of all other powers in that behalf enabling him, and by arrangement with the Board of Trade, hereby Orders as follows :—

1. In this Order, unless the contrary intention appears :—

(*a*) The expression "Local Authority" means, as the case may be, the Mayor, Aldermen and Commons of the City of London in Common Council assembled, the Council of a Metropolitan Borough, the Council of a Municipal Borough or other Urban District, the Council of a Rural District, or the Council of the Isles of Scilly ;

(*b*) The expression "District" means the District subject to the jurisdiction of the Local Authority for the purposes of the Public Health (London) Act, 1891(*b*), or of the Public Health Act, 1875(*c*), as the case may be.

2. The Minister of Health hereby confers and imposes upon the local authority, and upon such of their officers as they may designate or appoint for the purpose, the powers and duties necessary to provide for the due discharge within their district, or any part thereof, in conformity with the Emergency Regulations, 1926(*d*), of the functions assigned to local authorities by the Coal (Emergency) Directions, 1926(*e*), or any Directions amending or varying the same.

3. The Local Authority may delegate to a committee, with or without restrictions or conditions as they think fit, any of the powers and duties conferred or imposed upon them by this Order.

4. (1) Any expenses incurred by a Local Authority in the execution of this Order shall be defrayed in like manner as if the expenses had been incurred in the execution of the Public Health Act, 1875, or the Public Health (London) Act, 1891, as the case may be.

(2) Where any Local Authorities have combined for any of the purposes of this Order, any expenses incurred by those Local Authorities thereunder shall be defrayed in such proportions as may be agreed upon, or in default of agreement as may be determined by the Minister of Health.

5. This Order may be cited as "The Local Authorities (Coal Emergency) Order, 1926."

Given under the Official Seal of the Minister of Health this First day of May, in the year One thousand nine hundred and twenty-six.

(L.S.) *F. L. Turner*,
Assistant Secretary, Ministry of Health.

(*a*) S.R. & O. 1926, No. 450. (*b*) 54–5 V. c. 76.
(*c*) 38–9 V. c. 55. (*d*) S R. & O. 1926, No. 451.
(*e*) S. R. & O. 1926, No. 452.

Legal News.

Professional Announcement.

MESSRS. DAWSON & CO., of 2, New Square, Lincoln's Inn, W.C.2, announce that they have taken into partnership The Hon. HORACE WOODHOUSE, C.B.E., as from the 1st January last, in the place of Mr. E. J. A. Arnould, who has retired. The style of the firm will remain unaltered.

THE MUTUAL PROPERTY INSURANCE CO., LTD.

DIVISIONAL MANAGERS' CONFERENCE—AN INTERESTING PRESENTATION.

At the Divisional Managers' Conference held at the head office of this Company, 159/165, Great Portland Street, W.1, on Saturday, the 24th ult., the managing director (Mr. D. Arlott) made a very interesting presentation to Mr. F. W. Stone, the assistant general manager—who had been suffering from a long illness and was shortly taking a sea voyage to Madeira to recuperate.

The managing director said he understood that it was suggested some time ago that the divisional managers would like to show their regard and affection for Mr. Stone, and he was happy to say that this suggestion had matured, with the result that on behalf of the divisional managers he had the honour to ask Mr. Stone's acceptance of a handsome gold wristlet watch and a gold fountain pen with the good wishes of his colleagues.

Speaking of Mr. Stone's work for the Company, he said that whilst it had not been done alone, his untiring energies had been instrumental in making possible the remarks concerning the progress of the Company in the insurance press. All those who had had the honour of working with Mr. Stone in the past knew his worth and that what he had done was greatly to his credit. Mr. Stone's advice had always been appreciated, and he had doubtless helped to make the Company a national institution.

TRIBUTE TO THE LATE MR. A. J. LAWRIE, K.C.

When the quarterly meeting of the Justices for the County of London was held on the 30th ult. at the Sessions House, Newington-causeway, tribute was paid to the memory of the late Deputy-Chairman, Mr. A. J. Lawrie, K.C. Sir Edward Smith, chairman of the Standing Joint Committee, in moving a vote of condolence with Mr. Lawrie's widow and family, said that the late judge believed in remedial and corrective measures rather than punitive. He was a gentleman who ran his race straight and true, and always with a kindly heart. Sir Robert Wallace, K.C., chairman of London Sessions, said his late colleague was a great lover of justice and mercy, and believed that they should go hand in hand. The vote of sympathy was carried unanimously in silence.

Court Papers.

Supreme Court of Judicature.

ROTA OF REGISTRARS IN ATTENDANCE ON

Date.	EMERGENCY ROTA.	APPEAL COURT No. 1.	Mr. JUSTICE EVE.	Mr. JUSTICE ROMER.
Monday May 17	Mr. Bloxam	Mr. Synge	Mr. Bloxam	Mr. Hicks Beach
Tuesday .. 18	Hicks Beach	Ritchie	Hicks Beach	Bloxam
Wednesday 19	Jolly	Bloxam	Bloxam	Hicks Beach
Thursday . 20	More	Hicks Beach	Hicks Beach	Bloxam
Friday 21	*Synge*	*Jolly*	*Bloxam*	*Hicks Beach*

Date.	Mr. JUSTICE ASTBURY.	Mr. JUSTICE LAWRENCE.	Mr. JUSTICE RUSSELL.	Mr. JUSTICE TOMLIN.
Monday May 17	Mr. Ritchie	Mr. Synge	Mr. Jolly	Mr. More
Tuesday .. 18	Synge	Ritchie	More	Jolly
Wednesday 19	Ritchie	Synge	Jolly	More
Thursday . 20	Synge	Ritchie	More	Jolly
Friday 21	*Ritchie*	*Synge*	*Jolly*	*More*